Manual for Complex Litigation, Fourth

Federal Judicial Center 2004

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The *Manual for Complex Litigation, Fourth* has been produced under the auspices of the Federal Judicial Center. The analyses and recommendations are those of the *Manual*'s Board of Editors.

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Preface

This fourth edition of the *Manual for Complex Litigation* stands on the shoulders of the three previous editions and in the debt of the following: Judge William W Schwarzer, director of the Federal Judicial Center from 1990 to 1995, and primarily responsible for the third edition (1995); Judge Sam C. Pointer, who chaired the Board of Editors for the second edition (1985); Judge Alfred P. Murrah, the Center director who was the driving force behind the inaugural edition; Judge Thomas J. Clary, the chair of the initial Board of Editors; and the members of that Board.

The fourth edition of the *Manual* is adapted to new conditions and demands of federal litigation and reflects the work, experience, and insight of its Board of Editors. The Chief Justice, as chairman of the Board of the Federal Judicial Center, appointed the Board of Editors in 1999. He asked Judge Stanley Marcus, then a member of the Center's Board, to chair the Board of Editors. Judge Marcus has continued to oversee the *Manual*'s completion even though his term as a Center Board member ended in 2002. His insight and experience as a federal district judge and now as a member of the court of appeals are reflected on every page of the *Manual*. So, too, does this edition reflect the many hours dedicated to the project by individual members of the Board of Editors. A complete list of individuals who worked on the *Manual* can be found at Acknowledgments, page xix.

This *Manual* is one of the flagship services of the Federal Judicial Center. It has been my pleasure, as director of the Center, to have worked with Judge Marcus and the Board of Editors, and with the staff of the Center and others, to bring this fourth edition into being.

Fern M. Smith
Director, Federal Judicial Center 1999–2003

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Acknowledgments

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Introduction

The impetus for this fourth edition of the *Manual for Complex Litigation* was, as with the previous editions, significant change in the landscape of federal litigation and the increasing responsibilities of federal trial judges. A recommendation of the Mass Tort Working Group, appointed by the Chief Justice, served as a catalyst for this project.[1] Major changes include, but are hardly limited to, the growth in class action and mass tort litigation, and the trial judge's heightened role imposed by *Daubert v. Merrell Dow Pharmaceuticals*[2] and cases following it, and by *Markman v. Westview Instruments, Inc.*[3] The *Manual*'s orientation, however, differs little from the first incarnation. It "contains neither a simplified outline for the easy disposition of complex litigation nor an inflexible formula or mold into which all trial or pretrial procedure must be cast."[4]

Users should keep in mind several things about this edition. First, it is not, and should not be cited as, authoritative legal or administrative policy. As noted at page iii, it contains analyses and recommendations of the Board of Editors, but each member of the Board does not necessarily subscribe to all parts of the *Manual.* It was produced under the auspices of the Federal Judicial Center, but the Center has no authority to prescribe practices for federal judges. The *Manual*'s recommendations and suggestions are merely that. As always, the management of any matter is within the discretion of the trial judge.

Second, although federal trial judges are the *Manual*'s primary audience, the techniques and procedures discussed may be useful in state courts as well, particularly in view of the convergence that is occurring in related litigation pending in both state and federal court systems. Reference to the *Manual* may assist in the coordination of such litigation. The *Manual* will also assist lawyers, who share with judges the responsibility for managing complex litigation in which they are involved.

Third, as with the previous editions, this edition's "organization . . . belies the fact that its subject matter is not neatly divisible into distinct topics."[5] Nor is the term "complex litigation" susceptible to any bright-line definition. Part I

1. Mass Tort Working Group, Report on Mass Tort Litigation, 187 F.R.D. 293, 324 (1999).
2. 509 U.S. 579 (1993).
3. 517 U.S. 370 (1996).
4. Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 355 (1960) (quoted in Manual for Complex Litigation, Second, § 10 (1985)).
5. Manual for Complex Litigation, Third, § 10.2 (1995).

treats generic topics in complex (and other) litigation, such as pretrial and trial procedures and attorney fees. Part II analyzes special problems in complex litigation, such as class actions and expert scientific evidence. Part III has separate sections on complex litigation in various subject areas, such as antitrust and intellectual property. Part IV includes sample orders and forms. As the *Manual for Complex Litigation, Third* said, however, "[a] topic, such as settlement or class actions, will be relevant to the discussion at different points."[6] Thus, this edition too contains extensive cross-references. This fourth edition contains much new and revised material and has a somewhat different format and numbering system than that of the *MCL 3d*. However, because civil and criminal case management differ significantly, and in order to keep this volume to a manageable size, this edition deals only with civil litigation.

Finally, it could go without saying that changes in statutes, case law, regulations, and technology will quickly date some specific references in the *Manual*, and users need to exercise standard research practices when using the *Manual*. For example, prospective legislative changes in class action rules remained pending as the *Manual* went to press, and the precise changes could not be forecast. Before this edition went to press, significant changes in Federal Rules of Civil Procedure 23 and 53 were approved by the Supreme Court[7] and were before Congress pursuant to the Rules Enabling Act.[8] Because congressional acceptance of the amendments seemed likely, and the amended rules differed significantly from those in effect prior to December 1, 2003, the *Manual*, when treating class actions, uses the amended rules and the committee notes about those amendments.

In offering an array of litigation management techniques and procedures, the *Manual* does not recommend that every complex litigation necessarily employ any such procedures or follow a standard pattern. Choices will depend on the needs of the litigation and many other considerations. What the *Manual* does urge is that choices be made, and that they be made starting early in the litigation. While those decisions are largely the responsibility of the court, the judge should not take the case from the lawyers, but rather provide guidance and direction, setting limits and applying controls as needed. Additional Center publications on litigation management can be found at http://www.fjc.gov.

Complex litigation should not be viewed as monolithic. In some areas of law, such as antitrust and securities litigation, substantive and procedural rules

6. *Id.*

7. See letters of the Chief Justice to the Speaker of the House and the President of the Senate, March 27, 2003, and amendments adopted by the Supreme Court, in "2002 Term Court Orders," at http://www.supremecourtus.gov (last visited Nov. 10, 2003).

8. 28 U.S.C. § 2074 (2000).

are relatively well settled, as are management techniques. In others, such as environmental, civil rights, and mass tort litigation, rules are still emerging or undergoing change. While all complex litigation challenges courts, the unsettled areas present the greatest challenges.

Much complex litigation, therefore, will take the judge and counsel into sparsely charted terrain with little guidance on how to respond to pressing needs for effective management. Practices and principles that served in the past may not be adequate, their adaptation may be difficult and controversial, and novel and innovative ways may have to be found. While this *Manual for Complex Litigation, Fourth* should be helpful within the limits of its mission, it should be viewed as open-ended, and judges are encouraged to be innovative and creative to meet the needs of their cases while remaining mindful of the bounds of existing law and any variations within their own circuits.

all disclosures and discovery responses are complete and correct when made, and that requests, objections, and responses conform to the requirements of the Federal Rules;

- providing for compliance with the supplementation requirements of Rules 26(e)(1) and (2)[111] by setting periodic dates for additional reports;
- requiring periodic status reports to monitor the progress of discovery (which can be informal, by letter or telephone); and
- issuing an order, which may be a part of the scheduling order required by Rule 16(b) (see section 11.212), which incorporates the discovery plan (for a sample order, see section 40.24).

11.422 Limitations

Discovery control in complex litigation may take a variety of forms, including time limits, restrictions on scope and quantity, and sequencing. The Federal Rules and the court's inherent power provide the court with broad authority. Among other provisions, Federal Rule of Civil Procedure 16(b) directs the court to limit the time for discovery, and Rule 26(b) empowers the court to limit the "frequency or extent of use of the discovery methods" under the rules, including the length of depositions. Rule 30(a) imposes a presumptive limit of ten depositions per side. Rule 30(d) has a presumptive durational limit of one 7-hour day for any deposition. Rule 33 establishes a presumptive limit of twenty-five interrogatories per party (see sections 11.451, 11.462). Rule 26(f)(3) requires the parties to address discovery limits in their proposed discovery plan.

Presumptive limits should be set early in the litigation, before discovery has begun. Information about the litigation will be limited at that time, so limits may need to be revised in the light of later developments. But they should be imposed on the basis of the best information available at the time, after full consultation with counsel, and with the understanding that they will remain binding until further order. In determining appropriate limits, the court will need to balance efficiency and economy against the parties' need to develop an adequate record for summary judgment or trial. This task further underlines the importance of clarifying and understanding the issues in the case before

111. Rule 26(e)(2) does not apply to deposition testimony, but when the deposition of an expert from whom a report was required under Rule 26(a)(2)(B) reveals changes in the expert's opinion, it triggers the duty of supplementation imposed by Rule 26(e)(1). *See* Fed. R. Civ. P. 26 committee note; Fed. R. Civ. P. 26(a)(2)(C).

imposing limits.[112] The following are examples of discovery limits that a judge might consider:

- *Time limits and schedules.* The discovery plan should include a schedule for the completion of specified discovery, affording a basis for judicial monitoring of progress. Setting a discovery cutoff date[113] is an important objective, but may not be feasible at the initial conference in complex litigation. The discovery cutoff should not be so far in advance of the anticipated trial date that the product of discovery becomes stale and the parties' preparation outdated. Time limits impose valuable discipline on attorneys, forcing them to be selective and helping to move the case expeditiously, but standing alone they may be insufficient to control discovery costs. Unless time limits are complemented by other limitations, attorneys may simply conduct multitrack discovery, thereby increasing expense and prejudicing parties with limited resources. To prevent time limits from being frustrated, the judge should rule promptly on disputes so that further discovery is not delayed or hampered while a ruling is pending. Although attorneys will sometimes argue over "priorities," the rules provide for no such presumptive standing.
- *Limits on quantity.* Time limits may be complemented by limits on the number and length of depositions, on the number of interrogatories, and on the volume of requests for production. Imposing such limitations only after hearing from the attorneys makes possible a reasonably informed judgment about the needs of the case. Limitations are best applied sequentially to particular phases of the litigation, rather than as aggregate limitations. When limits are placed on discovery of voluminous transactions or other events, consider using statistical sampling techniques to measure whether the results of the discovery fairly represent what unrestricted discovery would have been expected to produce (section 11.493 discusses statistical sampling).
- *Phased, sequenced, or targeted discovery.* Counsel and the judge will rarely be able to determine conclusively early in the litigation what discovery will be necessary; some discovery of potential relevance at the outset may be rendered irrelevant as the litigation proceeds, and the need for other discovery may become known only through later developments. For effective discovery control, initial discovery should focus on matters—witnesses, documents, information—that appear

112. *See* Schwarzer & Hirsch, *supra* note 97.
113. *See In re* Fine Paper Antitrust Litig., 685 F.2d 810 (3d Cir. 1982).

pivotal. As the litigation proceeds, this initial discovery may render other discovery unnecessary or provide leads for further necessary discovery. Initial discovery may also be targeted at information that might facilitate settlement negotiations or provide the foundation for a dispositive motion; a discovery plan may call for limited discovery to lay the foundation for early settlement discussions. Targeted discovery may be nonexhaustive, conducted to produce critical information rapidly on one or more specific issues. In permitting this kind of discovery, it is important to balance the potential savings against the risk of later duplicative discovery should it be necessary to resume the deposition of a witness or the production of documents. Targeted discovery may in some cases be appropriate in connection with a motion for class certification; however, matters relevant to such a motion may be so intertwined with the merits that targeting discovery would be inefficient. See sections 11.41 and 21.2.

- *Subject-matter priorities.* Where the scope of the litigation is in doubt at the outset—as, for example, in antitrust litigation—the court should consider limiting discovery to particular time periods or geographical areas, until the relevance of expanded discovery has been established. See section 11.41.
- *Sequencing by parties.* Although discovery by all parties ordinarily proceeds concurrently, sometimes one or more parties should be allowed to proceed first. For example, if a party needs discovery to respond to an early summary judgment motion, that party may be given priority. Some judges establish periods in which particular parties have exclusive or preferential rights to take depositions, and in multiple litigation, those judges direct that discovery be conducted in some cases before others. Sometimes judges order "common" discovery to proceed in a specified sequence, without similarly limiting "individual" discovery in the various cases.
- *Forms of discovery.* Some judges prescribe a sequence for particular types of discovery—for example, interrogatories may be used to identify needed discovery and documents, followed by requests for production of documents, depositions, and finally requests for admission.

If the court directs that discovery be conducted in a specified sequence, it should grant leave to vary the order for good cause, as when emergency depositions are needed for witnesses in ill health or about to leave the country.

den or expense on the person subpoenaed.[174] Objections to production must be made in writing by the subpoenaed person; the requesting party must then move for an order to compel production.[175] If granted, the order must protect the nonparty from significant expense resulting from the inspection or copying[176]—the order may also protect against disclosure of privileged, confidential, or otherwise protected material and undue burden.[177]

11.45 Depositions

Depositions are often overused and conducted inefficiently, and thus tend to be the most costly and time-consuming activity in complex litigation. The judge should manage the litigation so as to avoid unnecessary depositions, limit the number and length of those that are taken, and ensure that the process of taking depositions is as fair and efficient as possible.

11.451 Limitations and Controls

The court has broad authority to limit depositions. Federal Rules of Civil Procedure 30(a)(2)(A) and 31(a)(2)(A) impose a presumptive limit of ten depositions each for plaintiffs, defendants, and third-party defendants (local rules may also restrict the number of depositions). Rule 30(d)(2) presumptively limits a deposition to one 7-hour day. While the parties may stipulate around the presumptive limit (unless prohibited to do so by the court), the court always has final authority under Rule 26(b)(2) to limit the number and length of depositions. Limits on depositions may also be imposed indirectly by the setting of the trial date or a discovery cutoff date. In large-stake cases, such limits can be evaded by multitrack discovery (concurrent depositions) in the absence of a further order by the court. Despite their cost and the potential for unfairness, such multitrack depositions may be a practical necessity to expedite cases in which time is of the essence. See section 11.454.

174. Fed. R. Civ. P. 45(c)(1).
175. Fed. R. Civ. P. 45(c)(2)(B).
176. *Id.*
177. Fed. R. Civ. P. 45(c)(3).

In exercising its authority to limit depositions, the court should use the information provided by the parties about the need for the proposed depositions, the subject matter to be covered, and the available alternatives. The extent to which the judge considers each particular deposition, categories of depositions, or only the deposition program as a whole will depend on the circumstances of the litigation. The judge may, for example, condition the taking of certain depositions, such as those of putative class members, on prior court approval. The judge's involvement in the development of this phase of the discovery plan should be sufficient to establish meaningful control over the time and resources to be expended. Aside from setting appropriate limits, the judge should also be concerned with the time and place of the depositions, including proposed travel and the recording methods.[178]

To ensure that abusive practices do not frustrate the limits placed on depositions in the discovery plan, the judge should insist on observance of rules for the fair and efficient conduct of depositions. Rule 30(d)(1) requires that objections be stated "concisely and in a non-argumentative and nonsuggestive manner"; local rules or standing orders may also establish guidelines for objections.[179] Under Rule 30(d)(1), counsel may instruct a deponent to not answer only for the purpose of enforcing a court-imposed limitation on evidence, or if preparing a motion under Rule 30(d)(3) to limit or terminate the examination for bad faith or harassment or to preserve a privilege (to the extent possible, disputed claims of privilege should be resolved in advance of the deposition). More stringent limitations may be imposed by local rule or by court order when necessary.[180] In addition, some judges issue guidelines covering the following matters:

- who may attend depositions;
- where the depositions are to be taken;
- who may question the witness;

178. Authority for judicial management of deposition discovery can be found in the federal rules. *E.g.*, Fed. R. Civ. P. 30(d) committee note (2000 amendment); Fed. R. Civ. P. 30(b), 30(d) committee notes (1993 amendment). For an example of comprehensive guidelines for deposition discovery not having the force of local rules or orders, but strongly encouraged by the court, see Civil Practice Fed. Court Comm., *Introduction to Civil Discovery Practice in the Southern District of Alabama* 11–16 (S.D. Ala. 1998), at http://www.als.uscourts.gov/district-court/forms/discprat.pdf (last visited Jan. 7, 2004).

179. *See, e.g.,* D.S.C. Civ. R. 30.04; N.D. Ohio Civ. R. 30.1. For a discussion of attorney conduct in depositions and citations to a number of cases construing local rules and standing orders, see *Hall v. Clifton Precision*, 150 F.R.D. 525, 527 (E.D. Pa. 1993). *But see In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998) (noting that deposition conduct orders should be narrowly drawn to avoid interfering with the deponent's right to counsel).

180. *See* Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993).

- how the parties are to allocate the costs; and
- how the attorneys are to conduct themselves.[181]

Rule 30(d)(3) expressly authorizes sanctions for "impediment, delay or other conduct that has frustrated the fair examination of the deponent."

Inefficient management of documents at a deposition can interfere with the deposition's proper conduct. The discovery plan should establish procedures for marking deposition exhibits, handling copies and originals, and exchanging in advance all papers about which the examining party intends to question the witness (except those to be used for genuine impeachment).[182]

11.452 Cost-Saving Measures

In addition to the general discovery practices discussed in section 11.42, there are numerous techniques used to streamline deposition discovery:

- *Informal interviews.* Informal interviews of potential witnesses may be arranged with the agreement of counsel. However, an attorney may not communicate with a represented party without the consent of that party's counsel. If the represented party is an organization, the prohibition extends to persons with managerial responsibility and any other person whose act or omission may be imputed to the organization or whose statement may constitute an admission on the part of the organization.[183] The prohibition does not extend to former corporate employees.[184] Informal interviews may be useful for persons who have only limited knowledge or involvement and who are unlikely to be called as witnesses at trial. The witness may be sworn and the interview recorded electronically for possible use later in the case; by agreement or court order, the interview may also be converted into a nonstenographic deposition.
- *Nonstenographic depositions.* The party taking a deposition may record it on audio or videotape instead of stenographically without having it transcribed. With prior notice to the deponent and other parties, any other party may make its own recording of the deposition.[185] Videotaped depositions offer a number of advantages: They help deter mis-

181. *See* sample order *infra* section 40.22.

182. *See, e.g., In re* San Juan Dupont Plaza Hotel Fire Litig., MDL No. 721, 1989 WL 168401, at *43–44 (D.P.R. Dec. 2, 1988) (five days' advance notice).

183. Model Rules of Prof'l Conduct R. 4.2 & cmt. (2002).

184. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991). The law of the circuit should be consulted for recent developments in this area of the law.

185. Fed. R. Civ. P. 30(b)(3).